United States Court of Appeals

for the Second Circuit

APPENDIX

75-7537

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANTONIA ECHEVARRIA, individually, and on behalf of all others similarly situated,

Plaintiff-Appellee,

- against -

HUGH CAREY, individually, and as Governor of the State of New York; ARTHUR H. SCHWARTZ, individually, and as Chairman of the State Board of Elections; REMO J. ACITO, individually, and as Vice Chairman of the State Board of Elections; DONALD RETTALIATA and WILLIAM H. McKEON, individually, and as Commissioners of the State Board of Elections,

Defendants-Appellants

-and-

HERBERT FEURER, individually, and as President of the New York City Board of Elections; ALICE SACHS, ANTHONY SADOWSKI, ELRICH EASTMAN, SALVATORE SCLAFINI, STANLEY KOCHMAN, ELIZABETH CASSIDY, CHARLES AVARELLO and JAMES BASS, individually, and in their respective capacities as Members of the New York City Board of Elections,

Defendants.

UNITED STATES COURT OF APPEALS
FILED
NOV 12 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel: (212) 488-3396

RICHARD J. HILLER
Puerto Rican Legal Defense
and Education Fund Inc.
Attorney For Plaintiff-
Appellee
95 Madison Avenue
New York, New York 10016
Tel: (212) 532-8470

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

208-1					

1a

PLAINTIFFS

ECHEVARRIA, ANTONIA, on behalf of each and on behalf of all others similarly situated,

DEFENDANTS

[illegible] New York;
[illegible] Ally
[illegible] Board
[illegible] and as
[illegible] State Board of
[illegible]
REITMAN, DONALD, and
McEON, WILLIAM H., individually and as Commissioners of the State Board of Elections;
FEURER, HERBERT, individually and as President, New York Board of Elections;
SACHS, ALICE;
SADOWSKI, ANTHONY,
EASTMAN, ELAINE,
SCIAPINI, SALVATORE,
ROSEMAN, STANLEY,
CABSISY, ELIZABETH,
AVARELLO, CHARLES and
JAMES EAGS, individually and in their respective capacities as Members of the New York City Board of Elections.

Civil Rights
28 USC 1343 & 2201 - Right to Vote.

LS

ATTORNEYS

Louis J. LeFrancois, Atty Gen'l N.Y.
Two World Trade Center N.Y., [illegible] 488-3396
(Carey et al)

Richard J. Hiller-Hervert Teitelbaum
Jack John Olivero
Puerto Rican Legal
Defense & Education Fund Inc.
95 Madison Avenue
NYC 10016
532 8470

CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	APR 14 1975	49954		JS-8	
	4/15/75	57651 B5		JS-6	09-75

DATE	NR	PROCEEDINGS Judge Owen
04-14-75	1	Filed Complaint and issued summons.
04-24-75	2	Filed Summons and marshals ret. Served: Hugh Carey on 4/15/75 Arthur H. Schwartz on 4/14/75 Remo J. Acito on 4/14/75 Donald Rettaliata ta on 4/14/75 William McKeon on 4/15/75 Herbert Feurer on 4/22/75 Joseph Previte on 4/22/75 Alice Sacha on 4/22/75 Anthony Sadowski on 4/22/75 Elrich Eastman on 4/22/75 Salvatore Sclafini on 4/22/75 Stnaley Kochman on 4/22/75 Elizabeth Cassidy on 4/22/75 Charles Avarello on 4/22/75 James Bass on 4/22/75
05-07-75	3	Filed defts' (Carey, Schwartz, Acito, Rettaliata & McKeon) affdvt & notice of motion for reassignment.-Ret. 5-16-75.
05-05-75	4	Filed ANSWER of defts.(Carey, Schwartz, Acito, Rettaliata & McKeon) LJK
05-14-75	5	Filed pltffs' affdvt in opposition to defts' motion to vacate assignment.
05-23-75	6	Filed pltffs' affdvt & notice of motion for a Rule 23 Determination & for summary judgment-Ret. 6-6-75.
05-23-75	7	Filed pltffs' memorandum in support of motion for summary judgment & for certification of this action as a class action.
05-30-75	-8-	Filed notice of reassignment to Judge Weinfeld. m/n
05-29-75		Filed Memo. Endorsed on motion filed 5-7-75 While it is true that the within action apparently turns on an identical issue of law to that decided by me in Avrutick V Wilson 74 civ 1590, I do not believe that these actions are related under calendar rule 13 of this Court, especially since final judg. in the Avrutick act was entered more than seven months ago. Accordingly, Iam returning this case to the coordinating clerk for random assignment. So Ordered--Owen, J. m/n
06-10-75	-9-	Filed stip and order that the motion for summary judgment be adjourned to June 17, at 2:15. rm 706. (with answering affdvts. and memorandums to be served by 6-11-
06-18-75	-10-	Filed stip. and order adj. ret. date of motion for summary judgment with pltf's reply memorandum to be served to 6-20-75.--Weinfeld, J.
06-20-75	-11-	Filed pltf's memorandum of law in Reply to the State defendants. memorandum of law
08-29-75	12	Filed memorandum of law for defendants Carey, et.al. in opposition to motion for summary judgment.
08-29-75	13	Filed opinion #43015....for reasons stated herein, motion for class action determination is granted. A declaratory judgment may be entered declaring sections 186 and 187 unconstitutional as applied to plaintiff and the class members. - Weinfeld, J. m/n
09-09-75	-14-	Filed Letter dated 9-975 by Weinfeld, J. memorandum opinion to all counsel
09-09-75	-15	Filed Judgmentand Order granting class action status, etc. that pltf. motion for for declaratory judgment is granted in re. New York Election 186 as indicated herein and applied to pltf. and the class members she represents. Judgment stays for 10 days--Weinfeld, J. --Judgment entered on 910-75-clerk m/n
09-15-75	-16-	Filed Filed notice that State defts. have appeal to the U.S.C.A. from a judgment a entered 9-10-75 only from that portion of judg. as to the declaration of the class action and the declaration of unconstitutionality of the NY Election Law mailed copies to Richard Heller and William DeWitt.
09-24-75	-17-	Filed notice of entry of judgmententered on 9-8-75.
09-30-75	-18-	Filed pltfs. motion for atty's fees, costs and disbursements on 10-14-75.
09-30-75	-19-	Filed pltfs memorandum of law in support of above motion for attys fees, costs and disbursements.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTONIA ECHEVARRIA, individually, and on behalf of all others similarly situated, Plaintiff, -against- HUGH CAREY, individually, and as Governor of the State of New York; ARTHUR H. SCHWARTZ, individually, and as Chairman of the State Board of Elections; REMO J. ACITO, individually, and as Vice Chairman of the State Board of Elections; DONALD RETTALIATA and WILLIAM H. McKEON, individually, and as Commissioners of the State Board of Elections; HERBERT FEURER, individually, and as President of the New York City Board of Elections; ALICE SACHS, ANTHONY SADOWSKI, ELRICH EASTMAN, SALVATORE SCLAFINI, STANLEY KOCHMAN, ELIZABETH CASSIDY, CHARLES AVARELLO and JAMES BASS, individually, and in their respective capacities as Members of the New York City Board of Elections, Defendants.	75 Civ. 1801 (EW)

JUDGMENT

Upon the pleadings, plaintiff's motion for summary declaratory judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and plaintiff's motion for certification of this action as a class action pursuant to Rule 23 (b)(2) of the Federal Rules of Civil Procedure, and the Opinion of the Court dated August 29, 1975,

IT IS HEREBY ADJUDGED THAT, plaintiff's motion for certification of this action as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure is granted, and the class

4a

is certified as consisting of all New York State residents recently arrived from out-of-state who could not have enrolled timely in the Democratic Party because they do not meet the residency requirements imposed by New York Law and who have acquired, or will acquire voting residence, but who are barred, or will be barred, nevertheless, from voting in future Democratic primary elections by the operation of Section 186 of New York's Election law; and it is,

FURTHER ORDERED, ADJUDGED, AND DECREED, that plaintiff's motion for a declaratory judgment is granted, and it is hereby declared that as applied to plaintiff Antonia Echevarria and the class members she represents, New York Election Law §186 (McKinney 1964) read together with New York Election Law &187 as applied to plaintiff and the members of the class she represents abridges their right to participate in the electoral process, impinges upon their right to travel, and denies them equal protection of the laws in violation of the First and Fourteenth Amendments to the Constitution of the United States, and is declared unconstitutional; and

UPON, the State defendants' application for a stay of this judgment, and the representations of the office of the Attorney General of the State of New York, acting pro se and as counsel for the State defendants, that (1) with respect to the September 9, 1975 primary elections it appears administratively impossible in view of the time constraints to observe the Court's judgment without creating confusion at the polls and increasing the likelihood of challenges to the election results, (2) it will file a notice of appeal from this judgment no later than September 15, 1975 and stipulate to expeditiously prosecute the appeal thereafter, and (3) it will advise the State defendants to inform local election officials to take preliminary steps necessary to assure subsequent observance of the Court's judgment if affirmed, and

UPON, the consent of plaintiff's counsel given pursuant to the aforesaid representations, it is hereby,

ORDERED, that the judgment of this Court be stayed for ten (10) days.

Dated: New York, New York
September 8, 1975

/s/ EDWARD WEINFELD
EDWARD WEINFELD
United States District Judge

U.S. DISTRICT COURT
FILED
AUG 29 1975
S. D. OF N. Y.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#H 3015

ANTONIA ECHEVARRIA, individually, and on behalf of all others similarly situated,

Plaintiff,

-against-

HUGH CAREY, individually, and as Governor of the State of New York; ARTHUR H. SCHWARTZ, individually, and as Chairman of the State Board of Elections; REMO J. ACITO, individually, and as Vice Chairman of the State Board of Elections; DONALD RETTALIATA and WILLIAM H. McKEON, individually, and as Commissioners of the State Board of Elections; HERBERT FEURER, individually, and as President of the New York Board of Elections; ALICE SACHS, ANTHONY SADOWSKI, ELRICH EASTMAN, SALVATORE SCLAFINI, STANLEY KOCHMAN, ELIZABETH CASSIDY, CHARLES AVARELLO and JAMES BASS, individually, and in their respective capacities as Members of the New York City Board of Elections,

Defendants.

75 Civ. 1801

OPINION

JACK JOHN OLIVERO, ESQ.
RICHARD J. HILLER, ESQ.
HERBERT TEITELBAUM, ESQ.
Puerto Rican Legal Defense
and Education Fund, Inc.
95 Madison Avenue
New York, New York 10016

BURT NEUBORNE, ESQ.
New York University School of Law
40 Washington Square South
New York, N. Y.

Attorneys for Plaintiff

LOUIS J. LEFKOWITZ, ESQ.
Attorney General of the
State of New York
Two World Trade Center
New York, N. Y. 10047

Attorney for Defendants
Carey, Schwartz, Acito,
Rettaliata and McKeon
and pro se pursuant to
Executive Law § 71

A. SETH GREENWALD
Assistant Attorney General
Of Counsel

W. BERNARD RICHLAND, ESQ.
Corporation Counsel of the
City of New York
Municipal Building
New York, N. Y. 10007

Attorney for Defendants
Feuer, Previte, Sachs,
Sadowski, Eastman, Sclafani,
Kochman, Cassidy, Avarello
and Bass

WILLIAM DeWITT
Of Counsel

EDWARD WEINFELD, D. J.

Plaintiff challenges the validity of section 186 of New York State's Election Law[1] as applied to her and others of her class. Plaintiff acquired voting residence in New York after the November 1974 general election, thereby entitling her to vote in the oncoming election in November 1975; however, section 186, which requires that voters must have enrolled in a party at least thirty days prior to the last general election in order to vote in the following primary, in effect forecloses her from voting in the primary election to be held on September 9, 1975. The issue -- whether section 186 so applied imposes an unconstitutional durational residence requirement -- was

---

(1) N. Y. Elec. Law § 186 (McKinney 1964): "Opening of enrollment box and completion of enrollment

> All enrollment blanks contained in the enrollment box shall remain in such box, and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. * * *"

before the Supreme Court in Rosario v. Rockefeller[2] but was not passed upon since the Court found that plaintiff in that action lacked standing to raise it.

The parties agree that upon the facts here presented, the matter is ripe for summary judgment determination. The plaintiff moves for such relief pursuant to Rule 56 and also for a class action certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure.[3]

Plaintiff resided in New York City for sixteen years from 1951 through October 1967, during

---

(2) 410 U.S. 452, 459 n.9 (1973).

(3) Plaintiff alleges she represents:

> "(a) the class of New York voters who could not have enrolled in the Democratic Party at the time of the November, 1974 general election because they did not meet the residence requirements imposed by New York law and who have since acquired voting residence, but who are, nevertheless, barred from voting in the 1975 Democratic Primary by the operation of Section 186 of New York's Election law, and (b) the class of all recently arrived New York State residents who could not have enrolled timely in the Democratic Party because they do not meet the residency requirements imposed by New York law and who will acquire voting residence, but are barred, nevertheless, from voting in future Democratic primary elections by the operation of Section 186 of New York's Election law."

which period she was a registered voter and enrolled as a member of the New York State Democratic Party. In October 1967, she moved to the Commonwealth of Puerto Rico where she remained until January 1975, when she returned to New York City and again took up residence there. On March 4, 1975, she registered to vote[4] and enrolled in the Democratic Party at the central office of the Board of Elections in New York City. She was then informed by a representative of the Board of Elections that she was ineligible to participate in the New York State Democratic primary to be held on September 9, 1975, because

(4) N. Y. Elec. Law § 150 (McKinney Supp. 1975) in pertinent part provides:

> "A person is a qualified voter in any election district for the purpose of having his or her name placed on the register if he or she is or will be on the day of the election qualified to vote at the election for which such registration is made. A qualified voter is a citizen who is or will be on the day of election eighteen years of age or over, and shall have been a resident of this state, and of the county, city or village for three months next preceding an election and has been duly registered in the election district of his residence. * * *"

she was not an enrolled member of the party as of thirty days prior to the November 1974 general election.

Section 187 of the New York State Election Law contains a special enrollment provision which permits one who acquired the necessary residential requirements after the last general election to enroll, but subdivision 6 of section 187 restricts such special enrollment "to the same county the voter resided in at the preceding year." (5)

---

(5) N. Y. Elec. Law § 187 (McKinney 1964) provides:

> "1. At any time after January first and before the thirtieth day preceding the next fall primary, * * * a voter may enroll with a party, transfer his enrollment after moving within a county, * * * as hereinafter in this section provided.
>
> "2. A voter may enroll with a party if he did not enroll on the day of the annual enrollment * * * (c) because he did not have the necessary residential qualifications * * * to enable him to enroll in the preceding year * * *.
>
> * * *
>
> "6. Special enrollment under the classification set forth in clause (c) of subdivision two is hereby expressly limited to a

While a surface reading of the restriction "to the same county the voter resided in at the preceding year" suggests that it is inapplicable to plaintiff and others of her class, who were not residents of the state at the last preceding general election and who therefore could not have been registered or enrolled in any county of the state, the New York State Court of Appeals has upheld a lower court ruling that subdivision 6 of section 187 also applies to out-of-state residents who arrive here after the cutoff date.(6) This Court, of course, is bound by that ruling.(7)

---

footnote 5 cont'd

voter otherwise qualified, who did not have the qualifications to vote at the previous general election and such special enrollment is restricted to the same county the voter resided in at the preceding year."

(6) Jordan v. Meisser, 29 N.Y.2d 661 (1971), appeal dismissed, 405 U.S. 907 (1972).

(7) O'Brien v. Skinner, 414 U.S. 524, 531 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971); Commissioner v. Estate of Bosch, 387 U.S. 456, 464-65 (1967). It has also been held that the construction placed upon a statute by a state's intermediate

Thus the Court's inquiry is directed to section 186, which in substance provides that, for a registered voter to participate in a party's primary, he must enroll at least 30 days before the general election by depositing his enrollment blank in a locked enrollment box which is not opened until the Tuesday following the general election when his enrollment is entered on the official registration books. Since plaintiff was not a resident of New York State in November 1974, she was not eligible to vote at that election and there was no way for her to register or enroll in any party thirty days before that election as required by section 186. Having met residency requirements after the November 1974 election, she was duly registered and is now entitled to vote at the oncoming general election to

---

footnote 7 cont'd

appellate court which was left undisturbed -- though not specifically passed upon -- on appeal to the state's highest court is similarly binding on the federal courts. Thorington v. Cash, 494 F.2d 582, 587 (5th Cir. 1974). Cf. Miami Parts & Spring, Inc. v. Champion Spark Plug Co., 364 F.2d 957 (5th Cir. 1966). This is the situation in the instant case.

be held in November 1975. But, under New York's interpretation of sections 186 and 187, she is barred from voting in the September primary, even though at that time she will have been enrolled as a member of the Democratic Party since March 1975. The earliest primary she will be eligible to vote in is the presidential primary in 1976.

Accordingly, plaintiff seeks a declaration that defendants' refusal, under color of sections 186 and 187, to permit her and members of her class to participate in the September 1975 primary election is an unconstitutional durational residence requirement which abridges their right to participate in the electoral process, impinges upon their right to travel, and denies them equal protection of the laws in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article IV, section 2 thereof. (8)

(8) Upon the argument of this motion, plaintiff withdrew her request for an injunction directing the defendants to permit her to participate in the 1975 primary elections, and expressly limited her claim to a declaratory

The issue is confined to plaintiff and other newly established residents of the state who, lacking the necessary residential qualifications, could not have voted at, or enrolled in a party prior to, the last general election, but who thereafter having attained the required residential qualifications are entitled to vote at the next general election, but nonetheless foreclosed from voting in the primary preceding that general election. The net effect of sections 186 and 187 as applied to plaintiff and members of her class is to impose a durational residency requirement of up to eleven months in order to be eligible to vote in the September 1975 primary election.(9)

---

footnote 8 cont'd

judgment. Under this circumstance, the Court is not called upon to consider convening a three-judge court under 28 U.S.C. § 2281 (1970), but is empowered to determine the constitutional issue. See Mitchell v. Donovan, 393 U.S. 427 (1970); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Rosario v. Rockefeller, 458 F.2d 649, 651 n.2 (2d Cir. 1972), aff'd, 410 U.S. 452 (1973), and cases cited therein.

(9) The plaintiff, in order to have been enrolled as of the November 1974 general election so as to

The right to vote in a primary election is as important as the right to vote in a general election and as such is similarly protected against state action.(10) As recently stated by the Supreme Court:

> "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activities' protected by the First and Fourteenth Amendments. * * * The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom" (11)

and clearly encompasses the right to vote in primary elections.

---

footnote 9 cont'd

qualify to vote in the ensuing primary, would have had to register and complete her enrollment prior to October 10, 1974, the last day of registration in New York City.

(10) Bullock v. Carter, 405 U.S. 134, 146-47 (1972); Terry v. Adams, 345 U.S. 461, 469-70 (1953); United States v. Classic, 313 U.S. 299, 314 (1941).

(11) Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973).

It cannot be seriously challenged that the period between the cutoff date for enrollment -- at least thirty days prior to a general election and the ensuing primary election in the following year -- eleven months in the instance of plaintiff and those of her class, is "lengthy."[12] The practical effect of sections 186 and 187 as applied to plaintiff is to work an absolute bar on plaintiff's right to associate with others who share her political beliefs by foreclosing her from voting at the September 9, 1975 primary. No act or conduct of plaintiff herself has resulted in the deprivation of that right, except the lack of the eleven-month durational residence. Unlike the plaintiff in Rosario, plaintiff here did not lose her right to enroll by her own neglect. Upon resumption of her residence in New York some three months after the deadline for enrollment expired, there was no way under New York law that she could have enrolled so as to be eligible to vote in the

(12) Rosario v. Rockefeller, 410 U.S. 752, 761 (1973).

September 9, 1975 primary. It is the application of section 186 alone that bars her from voting.

The initial question is whether section 186 is to be tested by the rational basis standard or by a more stringent standard of review.[13] Since the statute effectively deprives plaintiff of the right to participate in the ensuing primary election and to associate with others for the common advancement of their political views and beliefs, the statute is subject to a rigid standard of review and at a minimum must be "found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster."[14] In other words, is the eleven-month minimum residence requirement that is imposed upon plaintiff as a newly established resident of the State of New York before she is eligible to voice her preference in her party's primary election "necessary to

(13) Bullock v. Carter, 405 U.S. 134, 142-143 (1972).

(14) Id. at p. 144.

promote a compelling governmental interest"? (15)

The state justifies its law as reasonable in order to assure the integrity of the electoral process, essentially by preventing "raiding" or "crossing over" by members of one political party to another primarily for the purpose of affecting the results in the raided party so as to weaken its candidates at the general election. There can be no question that this is a valid purpose and that the prevention of "raiding" reflects a compelling state interest. (16) However, recognizing that

(15) Dunn v. Blumstein, 405 U.S. 330, 342 (1972). The formulation of the strict scrutiny test in Dunn differs somewhat from that in Bullock quoted immediately above in its insistence that the state's interest be a compelling one, and seems to be the most widely accepted view of the standard the Supreme Court has attempted to enunciate. Whether this standard or the standard announced in Bullock is the correct one, however, the end result here is the same.

(16) Rosario v. Rockefeller, 458 F.2d 650, 652 (1972), aff'd, 410 U. S. 752 (1973).

important interest does not resolve the constitutional issue; in the protection of that interest the state "cannot choose means that unnecessarily burden or restrict constitutionally protected activity."[17] Thus, inquiry is directed to whether section 186 is necessary to protect the state's interest insofar as it applies to out-of-staters who establish residency in New York after the cutoff date for enrollment.

The possibility that voters in this group would be exploited to raid political parties absent section 186 is minimal. First, section 150 of the Election Law,[18] which imposes a three-month residency requirement on all voters, eliminates the danger that large groups of non-New Yorkers would invade the state to vote on primary day. Furthermore, it is unrealistic to assume that many out-of-state persons will undertake the expense and suffer the inconvenience of moving to and establishing residency in New York simply so that they may raid

(17) Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

(18) N. Y. Elec. Law § 150 (McKinney Supp. 1975).

a party's primary election. Finally, it is unlikely that party organizers can build successful raiding campaigns from among those who have recently moved to the state for reasons unrelated to raiding. Such new arrivals, on the whole, will have an interest in local politics somewhat less partisan than those of more established residents. Experience suggests that, to the extent raiding occurs, raiders are more likely to be long time members of the conspiring party,(19) than new arrivals who have yet to establish a political affiliation in New York State. Under the circumstances, any alleged deterrent force of section 186 with respect to plaintiff is illusory and the time factor thereunder which deprives her of the right to vote in the primary is far beyond what is reasonably required to achieve that purpose.

(19) See, e.g., Zuckman v. Donahue, 191 Misc. 399, 79 N.Y.S.2d 169 (Sup. Ct.), modified, 274 App. Div. 216, 80 N.Y.S.2d 698, aff'd mem., 298 N.Y. 627, 81 N.E.2d 371 (1948); Werbel v. Gernstein, 191 Misc. 275, 78 N.Y.S. 440 (Sup. Ct.), aff'd, 273 App. Div. 917, 78 N.Y.S.2d 926 (1948).

Neither can the eleven-month waiting period be justified on the basis of administrative necessity. In Dunn v. Blumstein[20] the Supreme Court observed that thirty days appeared to be ample time to complete whatever administrative tasks are necessary to prevent fraud, and a year or three months too much. In Burns v. Fortson the Court in upholding Georgia's statute closing voter registration fifty days prior to election day as necessary "to promote orderly, accurate and efficient administration of state and local elections" nonetheless cautioned that "the 50-day registration period approaches the outer constitutional limits in this area."[21]

This Court therefore concludes that section 186, as applied to persons who move to New York State after the cutoff date for enrollment, is not necessary to effect the compelling state interest of preventing raiding of primary elections or to promote administrative efficiency. The law operates most harshly against

(20) 405 U.S. 330, 348 (1972).

(21) 410 U.S. 686, 686-87 (1973).

exactly the group of persons who present the least danger of engaging in the conduct that the statute seeks to prevent. Such impermissibly drawn legislation does not pass constitutional muster under the exacting standards that must be applied to preserve the constitutional rights at issue here. It impermissibly deprives a substantial number of qualified voters from participating in the primary election of their designated party; it penalizes those persons who have traveled from one place to another to establish a new residence; it discriminates against them and in favor of long-time residents of the state by denying them the opportunity to participate in a primary election and to associate with those who share their political views.(22)

(22) The state urges that principles of stare decisis and collateral estoppel require dismissal of plaintiff's complaint. This contention is without substance. Entirely apart from the fact that plaintiff was not a party to any of the cases upon which the state relies, each cited case is distinguishable from the facts in the instant case. Ortner v. Board of Elections, Dkt. No. 74 Civ. 3416 (S.D.N.Y. Sept. 9, 1974) (unreported), was a decision of a divided three-judge panel issued orally on the day before

There remains for final consideration plaintiff's motion for class action determination pursuant

---

footnote 22 cont'd

the 1974 primary elections were held.. Neale v. Hayduk, 35 N.Y.2d 182, 316 N.E.2d 861, 359 N.Y.S.2d 542 (1974), appeal dismissed, ___ U.S. ____ (1975), was a 4-3 decision of the New York Court of Appeals based largely on the proposition that the particular means chosen by the state to implement its compelling interest need only be reasonable. Hansen v. Board of Inspectors, Dkt. No. 12410 (Sup. Ct. June 26, 1973), aff'd, App. Div. 2d 45, 968, appeal dismissed, ___ U.S. ____ (1975), was a summary dismissal of an election-day challenge brought before a State Supreme Court justice which contained no discussion of the merits of plaintiff's claim.

Importantly, none of these cases involved nonresidents, but the claims of New York residents who had moved from one county to another. Although these plaintiffs also faced the absolute bar of section 186, and similarly did not fall within the special exceptions of section 187 (see note 4 supra), the claims of those who have been and continue to be New York residents may present problems different from those posed by nonresidents. Interestingly, the only case to consider the exact issue raised in this case also found section 186 unconstitutional as applied. Avrutick v. Wilson, 382 F. Supp. 984 (S.D.N.Y. 1974), vacated by stipulation, Dkt. No. 74-2432 (2d Cir. August 12, 1975). Even were the three cases the state cites indistinguishable from the case at bar, this Court would not hesitate to grant plaintiff the relief she seeks absent an authoritative declaration of a higher court.

to Rule 23(b)(2). Certification would appear unnecessary in the light of Italian Society of New York City Fire Department, Inc. v. Civil Service Commission.(23) However, at a further hearing following original argument of this matter, the state's representative did not give definite assurance that in the event plaintiff's position were upheld and the statute as applied to plaintiff declared unconstitutional, the state would accord to those in the same class as plaintiff the benefits of the declaratory judgment in her favor.

Sections 186 and 187 have been the subject of substantial and time-consuming litigation in the federal and state courts. As already noted, the Supreme Court in Rosario did not reach the issue here presented since plaintiffs in that action did not have standing to raise it. The issue is a recurring one and should be definitely set to rest one way or the other. It has been suggested that defendants may attempt to moot plaintiff's claim by the expedient of allowing her to vote in the September primary.(24)

(23) 490 F.2d 387, 399-400 (2d Cir. 1973).

(24) Cf. Sosna v. Iowa, 419 U.S. 393 (1975). But cf. Super Tire Eng. Co. v. McCorkle, 416 U.S. 115, 126 (1974), and cases cited therein.

But even so the issue will remain as to others in her class. Those voters similarly situated as plaintiff and newly arrived residents otherwise qualified, who are deprived of the right to vote in this or future primary elections under the same circumstances as plaintiff, are also aggrieved by the statute enforced by the state and now found unconstitutional. The fact that plaintiff prevails upon her claim for declaratory relief does not eliminate the claims of those, similarly situated, on whose behalf plaintiff also commenced this action.

The state opposes class action certification. It is difficult to fathom the basis of its opposition in the light of the time-consuming litigations in both the federal and state courts. In any event, there can be no question that the requirement of a class action as defined in Rule 23(b)(2), to wit, "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to

the class as a whole * * *," is fully satisfied, as are the other prerequisites under the Rule.

The vigor with which plaintiff's counsel has litigated this and other suits attacking the constitutionality of sections 186 and 187 gives full assurance that the interests of the class will be adequately protected.

Motion for class action determination is granted. A declaratory judgment may be entered declaring sections 186 and 187 unconstitutional as applied to plaintiff and the class members.

Dated: New York, N. Y.
August 29, 1975

EDWARD WEINFELD
United States District Judge

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

28a

CHAMBERS OF
JUDGE EDWARD WEINFELD

September 9, 1975

75 Civil 1801
ECHEVARRIA v. CAREY

MEMORANDUM TO COUNSEL:

An inadvertent oversight requires the Court to correct page 13 of its opinion as follows:

Eliminate in the first full paragraph the entire sentence beginning with "First," and ending with the phrase "on primary day," and substitute in place thereof the following:

> "First, the New York State Court of Appeals, in holding unconstitutional the three months' durational residence requirement (as distinguished from a bona fide residency requirement) imposed under the state's constitution and section 150 of the Election Law, recognized that a lesser period, not exceeding thirty days, was adequate to protect the state's interest in preventing voter fraud.(18) Thus an adequate investigatory period eliminates the danger that large groups of non-New Yorkers will invade the state just to vote in one of its primary contests."

Also, footnote 18 is corrected to read as follows:

> "Atkin v. Onondaga County Bd. of Elections, 30 N.Y.2d 401 (1972)."

Counsel are advised that the Court has physically substituted the corrected page in the filed opinion.

EDWARD WEINFELD
USDJ

Puerto Rican Legal Defense and Education Fund, Inc.
Burt Neuborne, Esq.
Louis J. Lefkowitz, Esq.
W. Bernard Richland, Esq.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

SUSAN D. CHIECO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Defendants Appellants herein. On the 17th day of November , 1975 , she served the annexed upon the following named person :

RICHARD J. HILLER
Puerto Rican Legal Defense
and Education Fund, Inc.
Attorney for Plaintiff-Appellee
95 Madison Avenue
New York, New York

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Susan D Chieco

Sworn to before me this
17th day of November , 1975

C. Seth Greenwald

Assistant Attorney General
of the State of New York